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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 780

JOSEPH J. SCHALLERER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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There Is a Conflict of Opinion as to the Application of the Doctrine Involved in Commissioner v. Culbertson, 337 U. S. 733, Between the Tenth Circuit and the Seventh Circuit and a Conflict of Opinion Within the Tenth Circuit and the Ninth Circuit.

The petitioner filed his petition in the above cause and it was called to the attention of the petitioner, after the petition had been filed, that there was a decision of the Court of Appeals for the Tenth Circuit involving the application of the doctrine in *Commissioner* v. *Culbertson,* 337 U. S. 733, directly contrary to the decision in this cause handed down by the Court of Appeals for the Seventh Circuit. Further that there was a substantial division of opinion in this matter in both the Tenth Circuit and the Ninth Circuit. This reply brief is prepared, after consultation with the

Clerk of this Court, so as to bring this situation to the attention of this Court.

On April 27, 1953 the Court of Appeals for the Tenth Circuit handed down a decision in the case of *Nicholas* v. *Davis* and your petitioner could only find that the reference as to this case is Case No. 4567 and reported in Prentice Hall Tax Service, 1953 edition, at paragraph No. 72,516. The facts in this case are directly in point to the question herein involved and there was a strong dissenting opinion by Judge Bratton of that Court in which the Judge holds that the case of *Commissioner* v. *Culbertson,* 337 U. S. 733, governs. The majority opinion is rendered by Chief Judge Phillips and that opinion affirms the judgment of the District Court affirming the validity of the family partnership therein involved. There would also seem to be a difference of opinion in the evaluation of the evidence by the District Court in this case as compared to the handling of the evidence in the case now before the Court and pointed out by your petitioner in the petition. It seems to the petitioner that the Tax Court in this case has failed to take into consideration all of the evidence presented and has failed to state in the opinion the factors or criteria upon which he based his opinion as to intent. The District Court has properly evaluated the evidence presented before it without omission of all of the facts.

Further, in the case of *Estate of Mabel Cochran* v. *Commissioner*, 201 F. 2nd 365, which was decided in the Ninth Circuit and which, the clerk of this Court has informed me, is docketed as No. 734 in the Supreme Court of the United States, there is a strong dissent by Judge Pope of the Court of Appeals of the Ninth Circuit which bears directly on the argument presented by your petitioner in the petition filed in the above cause now before this Court.

Judge Pope quotes the case of *Levin* v. *Commissioner,*

199 F. 2nd 692, 693, in his dissenting opinion on a petition for rehearing filed in that court and the following quotation from that opinion is such as to denote that the criteria set forth in the case of *Commissioner* v. *Culbertson,* 337 U. S. 733, are indefinite and may be misinterpreted by different courts to arrive at directly opposite opinions as to intent. Your petitioner asks the indulgence of this Court in quoting a short paragraph of this opinion:

> "Upon petition for rehearing it is argued that the findings of the Tax Court here under review themselves disclose that that court employed an erroneous concept as to the elements which must be present in order to justify a finding of bona fide intent to carry on a present partnership. It is urged that the reliance upon that wrong concept taints the decision and that we should assume that the court might arrive at a different finding of fact had the erroneous concept not been employed."
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> (Petitioner's note: The court then quotes *Levin* v. *Commissioner,* 199 F. 2nd 692, 693).
>
> "It seems to me that alike in both cases the Tax Court while recognizing that it must look at 'All the Factors' and to 'the entire record', yet by its language in each case indicated that it had not fully accepted what was decided in the *Culbertson* case."

The decision of the Tax Court in the case before this Court has presented no basis, criteria or factors upon which it claims that there was no intent to form a partnership and no factors which guided its decision, but merely quotes one paragraph set forth in the case of *Commissioner* v. *Culbertson,* 337 U. S. 733 and leaves the petitioner and counsel without any information as to what factors motivated the court in arriving at its decision as to intent.* Judge Pope is directly in point when he states that the Tax Court had not fully accepted what was decided in the

* Further the Tax Court has not considered the entire record as pointed out by the petitioner in the petition now before this Court.

case of *Commissioner* v. *Culbertson,* 337 U. S. 733 and if the criteria in that case is not fully set forth then this Court should clarify its opinion in the *Culbertson* case. The Tax Court in the above cause has not considered *all of the facts* or *the entire record* as this petitioner has pointed out in the original petition.

In view of the decision of the Court of Appeals in the Tenth Circuit, which is at variance with the decision of the Court of Appeals in the Seventh Circuit in the cause before this Court, and further in view of the dissenting opinion in the Tenth Circuit and the dissenting opinion in the Ninth Circuit this Court should grant the Petition before this Court and then review the contention of the Petitioner as to a lack of review as to the validity of the trusts herein involved, and then review and clarify the decision of this Court in *Commissioner* v. *Culbertson,* 337 U. S. 733.

Respectfully submitted,

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Dated June 4, 1953.